INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

CASES:

Baxter v. *United States*, 188 F. 2d 119	9
Delaney v. *United States*, 263 U.S. 586	11
Harris v. *United States*, 331 U.S. 145	8
Hart v. *United States*, 162 F. 2d 74	9
Kann v. *United States*, 323 U.S. 88	10
Lane v. *United States*, 148 F. 2d 816, certiorari denied, 326 U.S. 720	7
Marron v. *United States*, 275 U.S. 192	9
United States v. *Hodorowicz*, 105 F. 2d 218, certiorari denied, 308 U.S. 584	10
United States v. *Johnson*, 319 U.S. 503	11

STATUTE:

United States Code:	
26 U.S.C. [1946 ed.] § 2803, 53 Stat. 303	2, 3
26 U.S.C. [1946 ed.] § 2913, 53 Stat. 345	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 476

ROBERT GLENN JOHNSON, SR., L. P. JOHNSON, JAMES PARKS and IKE WELBORN, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 24-27) is reported at 199 F. 2d 231.

JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1952 (R. 28), and a petition for a rehearing (R. 28-31) was denied on November 1, 1952 (R. 34). The petition for a writ of certiorari was filed on December 1, 1952. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether liquor discovered in the course of a search for a fugitive for whom federal officers had a warrant of arrest could properly be seized.

2. Whether the evidence was sufficient to support petitioners' convictions.

STATUTES INVOLVED

26 U.S.C. [1946 ed.] § 2803, 53 Stat. 303, provides:

> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

26 U.S.C. [1946 ed.] § 2913, 53 Stat. 345, provides:

> Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or

removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

STATEMENT

An indictment against petitioners L. P. Johnson, Welborn, and Parks, and a separate indictment against petitioner Glenn Johnson, Sr. (referred to in the caption as Robert Glenn Johnson, Sr.) returned in the United States District Court for the Middle District of North Carolina charged violations of 26 U.S.C. 2913 and 2803, (*supra*, pp. 2-3) as follows: (1) removal and aiding and abetting in the removal of distilled spirits, upon which the required tax had not been paid; (2) concealment and aiding and abetting in the concealment of such spirits; and (3) possession of spirits (T.R. 6, 7).[1]

The cases having been consolidated and a jury trial waived, the court simultaneously heard the evidence in the case and motions to quash the indictment. The petitioners' motions to suppress

[1] "T.R." refers to the typewritten transcript of the record; "R." to the printed transcript of record; and "Tr." to the transcript of the testimony at the trial.

as evidence the liquor involved, and for a directed verdict of not guilty, were overruled. At the close of all of the evidence, the petitioners' motions were again overruled, and petitioners were found guilty as charged. Petitioner L. P. Johnson was sentenced to 18 months' imprisonment and a $2500 fine; Welborn and Parks to 15 months' imprisonment; and Glenn Johnson, Sr., to 15 months' imprisonment and a $1250 fine. (R. 17-21; 32, 33; Tr. 161, 165-167) On appeal the Court of Appeals affirmed the convictions in a *per curiam* opinion (R. 23-28).

The evidence may be summarized briefly as follows:

A deputy United States marshal, John Stephenson was in possession of a grand jury indictment and capias for the arrest of one Bill Pardue, a fugitive from justice, and had information that Pardue was hiding in the home of either Glenn Johnson, Sr., or of his son, L. P. Johnson (R. 5; Tr. 126-127, 134-135). In seeking to apprehend the fugitive, Stephenson enlisted the help of several investigators of the Alcohol and Tobacco Tax Unit. (Tr. 127). On the night of April 30, 1952, the deputy marshal and some officers of that unit went to Glenn Johnson's home, while other officers of the Unit were left to watch the home of L. P. Johnson for a possible escape by the fugitive. The two homes were only a few hundred yards apart (R. 10, 13-14).

The deputy marshal informed Glenn Johnson at his home that he had a warrant for the arrest of Bill Pardue, who was suspected of staying there. Glenn Johnson grudgingly permitted a search of his home for the fugitive, but the officers found no one. (R. 5-6)

Meanwhile, two of the officers, Nicholson and Gard, discovered a refrigerator truck parked behind the garage on Glenn Johnson's premises. The truck resembled the description of a vehicle believed to transport illicit liquor in the surrounding vicinity, and Nicholson had previous information about that vehicle (Tr. 11-12). Gard and the deputy marshal inquired of Glenn Johnson and his son Fred if they had the keys to the truck, but they denied any knowledge of the truck (R. 3-4, 6-7). The deputy marshal instructed Gard and the other officers to open the truck to look for the fugitive, and gave one of them a Stillson wrench for that purpose (R. 7, 9). Nicholson knocked the lock from the back door of the truck and found 20 cases of white non-taxpaid whiskey in half-gallon fruit jars. Nicholson stated that he went into the truck looking for whiskey, not for the fugitive, and that the deputy marshal had not directed him to knock the lock off the truck. The officers brought the truck and liquor to their headquarters, but Glenn Johnson was not taken into custody until the next day. (R. 2-3; Tr. 13.)

At the L. P. Johnson home, a strong odor of whiskey was apparent, and officer Velich could

hear the moving about of heavy objects, such as tubs being scraped across a cement floor (R. 10). Although the officers had apprehended on the premises a boy named Pardue, he was not the fugitive sought (R. 12). As the other officers approached after the unsuccessful search for the fugitive at the Glenn Johnson house, officer Echard apprehended petitioner Parks, whose overalls were saturated with a liquid having a strong whiskey odor and who was walking quickly toward the woods in back of the L. P. Johnson house (R. 15).

When the deputy marshal notified petitioner L. P. Johnson of the warrant for the arrest of the fugitive, Johnson, who was intoxicated, remonstrated that his house could not be searched without a search warrant. He was taken into custody and a search was conducted. (R. 12) Petitioner Welborn, who was observed making a "bee line" for the basement, was apprehended as he hid behind a partition in the wall (R. 12; Tr. 132). In the garage, the door to which directly adjoined the kitchen of the house, 237 gallons of white nontaxpaid whiskey were found by officer Nicholson (Tr. 17). According to the deputy marshal, L. P. Johnson claimed ownership of the liquor in his garage as well as the liquor on the truck found parked on his father's premises. He asserted that the truck was his and that he had put it there (R. 7, 9).

ARGUMENT

1. Petitioners contend that the search of the refrigerator truck and the seizure of the contraband liquor from that truck, which was parked on the premises of Glenn Johnson, were illegal since conducted without a search warrant (Pet. 7-8). It is undisputed, however, that marshal Stephenson had a valid warrant for the arrest of a fugitive. Armed with this warrant, he and his fellow officers had the right to search for the fugitive in the house and on the premises, including the part of the driveway upon which the truck was parked. *Cf. Lane* v. *United States*, 148 F. 2d 816 (C.A. 5), certiorari denied 326 U. S. 720. In the marshal's experience, he had known of many instances where he had found fugitives asleep in trucks (R. 8). Although there were no windows in the truck, it was entirely possible that there might have been some sources of ventilation; and it was manifestly not the duty of the officers to make a minute exploratory examination of the truck for means of ventilation before they would be authorized to open it to search for the fugitive. Neither was it necessary, as petitioners intimate (Pet. 8), that the marshal have definite information that the fugitive would be concealed in the truck. Fugitives are necessarily mobile, making advance notice of their exact location difficult.

Although officer Nicholson stated that he entered

the truck looking for liquor and not for the fugitive, that did not alter the fact that the search and seizure were reasonable, in a *bona fide* attempt to find the fugitive under authority of the valid warrant of arrest.[2] There was evidence that the marshal had told other officers, "Open [the truck], we are looking for Bill Pardue"; that he gave them the Stillson wrench to open the truck; and that he told the officers "to open the truck to see if the man was in there". (R. 7, 9) Nicholson, regardless of his subjective feelings, was merely assisting his fellow officers in carrying out the marshal's directions that the truck be opened to search for the fugitive. He was well aware from the start that the marshal had brought him and the other officers for the stated purpose of assisting in the apprehension of the fugitive (Tr. 126-127).

The fact that the search resulted in the discovery of contraband liquor instead of the fugitive does not affect its validity. Cf. *Harris* v. *United States*, 331 U. S. 145, 155: "If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement

---

[2] Since our view is that the search and seizure were reasonable and valid as part of an authorized attempt to enforce the warrant of arrest, it is unnecessary to determine whether the fact that the officers also knew that the truck answered the description of a liquor-hauling truck they were seeking was an independent reason justifying the search of the truck without a search warrant.

agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated."[3] In the instant case, the officers gained legal entrance to the premises under a valid warrant of arrest. It is clear, therefore, that they were legally authorized to arrest any persons thereon who were found to be violating the law, and to seize any property used in connection with such violations. See *Marron* v. *United States*, 275 U. S. 192, 198-199.

Petitioner's attack on the validity of the search of the L. P. Johnson home is also without merit (Pet. 8-9). The officers did not enter the home to begin searching for the fugitive until after petitioner L. P. Johnson had been informed of, and had read the warrant of arrest. The contraband liquor was found in the garage, which adjoined the kitchen and was directly attached to the house, and was a place where the fugitive might well be hiding.

In the circumstances described, both searches and seizures were reasonable and valid, and they were not a usurpation of authority by the officers in carrying out their legal attempts to enforce the valid warrant of arrest.

---

[3] Both *Hart* v. *United States*, 162 F. 2d 74 (C.A. 10) and *Baxter* v. *United States*, 188 F. 2d 119 (C.A. 6), on which petitioners rely, involve situations where the entry was found to be unauthorized.

2. Finally, the contention is made, without any argument to sustain it, that the evidence was insufficient to warrant the convictions of petitioners Glenn Johnson, Welborn, and Parks (Pet. 5).

As to petitioner Glenn Johnson, he did not introduce any evidence to explain his possession of the contraband liquor in the parked truck. The nontaxpaid liquor was found, however, on his premises under suspicious circumstances in a refrigerator truck designed to conceal its identity (R. 1-2, 7, 8, 27). He had such dominion and control of the liquor as to give him the power to dispose of it. Cf. *United States* v. *Hodorowicz,* 105 F. 2d 218, 220 (C.A. 7), certiorari denied, 308 U. S. 584. From this evidence the trial court could find him guilty, as it did. It was not bound by the marshal's testimony that L. P. Johnson claimed sole ownership of both the truck and the liquor in it, since as trier of the facts the court had power to determine the credibility of the evidence.

As to petitioners Welborn and Parks, they were arrested under incriminating circumstances while attempting to hide in and escape from the L. P. Johnson premises, where large amounts of nontaxpaid liquor were discovered. Their guilt was clear.

Both courts below having found the evidence sufficient to support petitioners' convictions, there is clearly no occasion for further review of the evidence by this Court. See *Kann* v. *United States,*

323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.[4]

CONCLUSION

The decision of the court below is correct, there is no conflict of decisions, and further review is not warranted. Therefore, it is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

[4] There is no merit in petitioners' complaint that there was no written record of a verdict of guilty for the defendants in No. 3835, and that their counsel had no authority to waive this alleged discrepancy in their absence in the Court of Appeals (Pet. 10). The record discloses that the trial court did enter verdicts of guilty as charged in the indictment as to all three defendants, and that the Court of Appeals was satisfied as to this (R. 32-33, 34).

☆U.S. GOVERNMENT PRINTING OFFICE 1953—241996/P.O. 1143